(4) No. 96-270

In The

Supreme Court of the United States

October Term, 1995

AMCHEM PRODUCTS, INC., ET AL.,

Petitioners,

v.

GEORGE WINDSOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS AILEEN CARGILE ET AL.

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31 pgs

QUESTION PRESENTED

Should this Court review the Third Circuit's rejection of a Rule 23(b)(3) class action certified for settlement, that could not have been certified as a litigated class, where: a) the Third Circuit based its decision on grounds independent of the issue raised by Petitioners; b) the Third Circuit has not yet addressed the fairness of the settlement nor had an opportunity to address other dispositive legal issues; c) the decision did not exacerbate any asserted inter-circuit conflict; and d) the issue presented may well be mooted by pending revisions to Rule 23?

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STATEMENT

This action, brought pursuant to Federal Rule of Civil Procedure 23(b)(3), involves a proposed global nationwide class action settlement of asbestos claims against 20 companies which comprise the Center for Claims Resolution (CCR). It is undisputed that "[e]xamined as a litigation class, this case is so much larger and more complex than all other class actions on record. . . . " App. 19a.

The Third Circuit rejected the certification of the class and vacated the injunction that prevented class members from initiating claims outside the settlement's administrative scheme. The Petition asks this Court to review only one basis for the Third Circuit's interlocutory order – its holding that the settlement class could not "conceivably satisfy Rule 23" requirements, if litigated. However, the Third Circuit rested its decision on at least two grounds which are independent of the issue presented for review. Moreover, many critical questions concerning this highly controversial settlement – its fairness, as well as serious jurisdictional and due process challenges – were not reached by the Third Circuit and thus are not before this Court. As a result, any decision by this Court on the question presented would have no effect in this case and would be nothing more than an abstract advisory opinion on civil procedure.

Petitioners assert virtually the same grounds for certiorari that were advanced – and rejected – last year in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied sub nom. General Motors Corp. v. French*, 116 S. Ct. 88 (1995) ("*GM Trucks*"). As with *GM Trucks*, this case is inappropriate for Supreme

Court review because the lower court explicitly based its holding in part on grounds independent of the issue presented. Moreover, unlike *GM Trucks*, this case comes in an interlocutory posture where critical jurisdictional, due process and fairness issues have not even been addressed by the lower appellate court. This case is, thus, an even less appropriate vehicle for addressing Petitioners' claim than was the *GM Trucks* case.

The Petitioners in *GM Trucks* asserted the same "dire" inter-circuit conflict now raised by the current Petitioners. Nothing since *GM Trucks* has altered or exacerbated any conflict. Indeed, litigants are now one year closer to a rules revision of Rule 23 which may well moot the issue. Nor is any conflict among the circuits "starkly illuminated" by the Fifth Circuit's not yet final judgment in *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), approving a global settlement of claims against one defendant and its insurers. To the contrary, the Fifth and Third Circuit's recent decisions are each carefully limited, recognizing important and distinguishing factors between the *Georgine* and *In re Asbestos* classes. The *Georgine* case concerns a Rule 23(b)(3) class case, in which no claim is made that defendants lack the resources to pay claims outside the class context. Yet, the *Georgine* settlement fixes low damage recoveries and sharply limits recourse to the tort system. See discussion, *infra* at 4-6. By contrast, the *In re Asbestos* case involves a Rule 23(b)(1)(B) class predicated upon the staggering risk of loss of insurance coverage, which mandates unitary disposition. That settlement, in contrast to *Georgine*, neither specifies individual damages nor limits access to the tort system. For

these and other reasons, the impact of the Third Circuit's holding in *Georgine* will be limited.

1. Relevant Facts Concerning the Proposed Class and Settlement

This lawsuit commenced with the simultaneous filing of a class action complaint, an answer and a Stipulation of Settlement (the "Settlement") on January 15, 1993. App. 23a-24a. On the same day, the named plaintiffs and CCR (the "Settling Parties") filed a motion for class certification, which the district court granted just two weeks later. App. 24a, 26a. The district court approved the settlement on August 16, 1994, and entered the preliminary injunction barring class members from initiating claims against CCR until a final judgment was entered. App. 29a-30a.

The district court has yet to enter a final judgment in the action, however, because the settlement is expressly conditioned upon CCR's insurers assuming liability for the settlement, an issue still pending before the district court. App. 34a. Since no judgment has been entered below, the district court's approval of the settlement following a "fairness" hearing has not yet been appealed.[1] This appeal is thus from the issuance of the preliminary injunction only.

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[1] The Petition falsely implies that Respondents did not challenge the fairness of the Settlement, or the district court's factual findings below. Petition at 5, 8. Respondents did challenge many aspects of fairness at the district court. As noted, the fairness issues have not been addressed by the Third Circuit because final judgment has not been entered.

The Scope of the Settlement – The proposed Settlement would extinguish all present and future asbestos-related claims of individuals who had not filed suit before January 15, 1993. The class is defined to include all persons who had been exposed to asbestos either occupationally or through exposure as a spouse or household member of such exposed person, *and* all spouses and family members of such persons who had not filed an asbestos related lawsuit against CCR as of the date the class action was commenced. App. 23a.

The proposed Settlement encompasses claims arising in over fifty separate jurisdictions, based upon all different types of asbestos diseases, against twenty different companies. Class members were "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." App. 41a. The complaint asserts claims based on negligence, strict liability, breach of warranty, emotional distress, enhanced risk of disease, medical monitoring and civil conspiracy. App. 24a.

The class was certified pursuant to Federal Rule of Civil Procedure 23(b)(3), the class action procedure used where claims are primarily for money damages and there is no particular risk of impairment of class member interests absent a class action solution. The Petitioners concede that they are financially solvent and could continue to meet their financial obligations through the tort system.

Settlement Compensation Scheme – The Settlement does not simply provide for a general recovery fund but rather establishes an elaborate administrative scheme that "fixes

a range of damages that CCR will award for each disease, and places caps both on the amount that a particular victim may recover and on the number of qualifying claims that may be paid in any given year." App at 25a.

Despite the fact that no claims are made by CCR of potential insolvency or inability to pay, the fixed damages are set at amounts which fall far short of those awarded in the tort system. Thus, the Settlement provides no cash compensation to pleural claims "even though such claims regularly receive substantial monetary payments in the tort system." App. 26a. Similarly those "unlucky" few who contract mesothelioma[2] are "relegate[d] . . . to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars." App. 49a.[3] Although the settlement

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[2] Mesothelioma is a fatal cancer of the lining around the lung and/or abdomen that results from exposure to asbestos. Although only a small fraction of those exposed to asbestos will contract mesothelioma, its victims generally die within two years of diagnosis. App. at 56a. Unlike other asbestos diseases (such as lung cancer), the only medically established cause of mesothelioma is asbestos exposure. *Id.*

Mesothelioma can be caused by only slight or incidental exposure to asbestos fibers. The disease has been known to occur in children who lived with an asbestos-exposed parent or in household members who washed the clothes of an asbestos worker. App. at 56a. As the Third Circuit stated, "[t]he unpredictability of the disease is exacerbated by the long latency period between exposure to asbestos and the onset of the disease, typically between fifteen to forty years." *Id.*

[3] The Settlement provides that the "average negotiated value" for mesothelioma claims is $37,000 to $60,000. App. at 274a.

binds plaintiffs in perpetuity,[4] the fixed damage amounts are not adjusted for inflation. App. 25a.

While the settlement theoretically allows some class members dissatisfied with their settlements to pursue their claims in court, this option is "severely" limited. Only two percent of mesothelioma and lung cancer claimants, one per cent of "other cancer" claims and one-half percent of "non-malignant" claims may sue in the tort system. App. 25a.

2. The Decision Below

The Third Circuit recognized that the injunction could not bind the class unless the class was properly certified under Rule 23(b)(3). Accordingly, the court's decision focused on these prerequisites to class treatment.

Commonality – The Third Circuit first discussed the commonality requirements of Rule 23(a)(2) and (b)(3), but, mindful of the implications for other types of class actions, such as Rule 23(b)(1)(B) cases, rested its commonality holding on the (b)(3) requirement that common questions predominate over individual issues. App. 43a.[5] Under this demanding (b)(3) standard, the Court found that "the huge number of important individualized

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[4] In contrast, each defendant is free to withdraw from the settlement unilaterally after ten years. App. at 26a

[5] The court also distinguished this case from more limited certifications that involve injunctive relief ("infinitely fewer individualized issues than are posed here," App. at. 42a), property damage actions, cases where there was a central single issue such as one basic defense (App. at 45a), or cases involving only partial certification of common issues (App. at 47a).

issues" (App. 48a), overwhelmed the common and largely settled issue of the capacity of asbestos fibers to cause physical injury. App. 40a. The court noted the broad range of individual conditions, injuries, exposures and matters of causation among class members – all issues compounded "exponentially" by what the court perceived to be the requirement of individualized state by state choice of law analysis. App. 41a.

Adequacy of Representation and Typicality – The court next found that serious intra-class conflicts precluded a finding of adequacy of representation required by Rule 23(a)(4). Focusing on the terms of the Settlement, the Court explained that it "does more than simply provide a general recovery fund. Rather it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions which necessarily favor some claimants over others." App. 49a (emphasis in the original). Thus, many kinds of claims are provided no recovery (e.g., "pleural", medical monitoring and loss of consortium claims), or very limited recoveries (e.g., mesothelioma) for which there is a back-end opt-out right limited to "a few persons per year". *Id.*

The "most salient conflict" highlighted by the court was between presently injured and futures plaintiffs. App. 49a. While the currently injured have an interest in maximizing current payments, and have little interest in delayed opt-out rights or inflation adjustments, futures plaintiffs would want to maximize future payments, adjust the settlements to take account of inflation and

changing medical science, and provide for a delayed opt-out right. App. 49a-50a.[6]

For some of the same reasons, typicality was lacking. The court further noted that the plaintiffs could not be typical of the "hodgepodge of factually as well as legally different plaintiffs" in the class. App. 53a.

Superiority – Finally, the court below found that Rule 23(b)(3)'s requirement that the action be "superior to other available methods" was lacking. It determined: (a) that the superiority requirement would not be met if the class were "[c]onsidered as a litigation class;" but also (b) that superiority was lacking even if the settlement were considered, because, "in this class action," plaintiffs "have a substantial stake in making individual decisions on whether or when to settle" yet "may become bound to the settlement even if they are unaware" of the settlement "or lack sufficient information to evaluate it." App. 55a. The court emphasized that the problems could have been alleviated by inclusion of provision in the Settlement which, for example, permitted victims to opt-out at the "back-end." App. 56a, n.16.

Finally, the court noted that, while this Settlement was not legally acceptable, more carefully limited classes and consolidation of claims remain viable alternatives for the resolution of this and other mass tort cases. App. 57a.

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[6] The court below analogized this conflict to the conflict in the *GM Trucks* case between individual and fleet owners. App. at 51a.

REASONS FOR DENYING THE WRIT

A. The Issue Raised by Petitioners Is Only One of Several Independent Grounds Relied Upon by the Third Circuit in Rejecting the Class Certification

If this Court reviews the largely abstract proposition that Petitioners urge, its ruling will not affect the outcome of this case because the Third Circuit did not rest its decision solely on the basis claimed by Petitioners – that the Settlement should be ignored in assessing class certification. In fact, the court below held that the purported class failed to satisfy at least two other aspects of Rule 23: adequacy of representation and superiority. And, most importantly, in reaching this conclusion, the court below explicitly *did* examine the terms of the Settlement. On both issues, the court held that, even taking the Settlement into account, the class fell far short of meeting these Rule 23 requirements. Thus, contrary to the Petitioners' assertion, the decision below, like *GM Trucks*, was based on alternative independent grounds.

1. Lack of Adequate Representation

The Third Circuit found that serious intra-class conflicts inherent in the structure of the Settlement precluded the class from meeting Rule 23(a)(4)'s adequacy of representation requirement. The Court's conclusion flowed from its explicit consideration of the actual terms of the Settlement and, particularly, the Settlement's failure to incorporate structural protections (such as sub-classing) in the class definition that could have mitigated these conflicts.

The court below closely scrutinized the terms of the Settlement and particularly those relating to the Settlement's compensation schedule, which fixes values for different categories of disease. The court emphasized that the Settlement "does more than simply provide a general recovery fund. Rather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions which necessarily favor some claimants over others." App. 49a (emphasis in original).[7] As the Court explained, under the Settlement, some claimants who are regularly compensated in the tort system get no compensation at all (those with asymptomatic pleural thickening), while others who suffer the worst injuries, such as mesothelioma, are relegated to a modest recovery instead of tort system recoveries of "millions of dollars." App. 49a.

The intra-class conflict created by the Settlement's fixed settlement values is further exacerbated by the failure of the Settlement to provide a meaningful right to opt out of the Settlement at the "back-end" and by annual flow rates that limit the number of claims that may be resolved each year. These provisions of the Settlement create an unacceptable conflict of interest between class members with present injuries and those who may suffer

[7] By contrast, the settlement in *In re Asbestos Litig.* did not specify damage allocations but rather sets up an "equitable distribution process" which includes a meaningful back-end opt-out right. *In re Asbestos Litig.*, 90 F.3d at 976, n.7. In its opinion, the Fifth Circuit contrasted this approach with the terms of the *Georgine* settlement, which provide no meaningful back-end opt-out. *Id.* at 976, n.8.

injury in the future.[8] The court concluded that the Settlement resolves this conflict in favor of the presently injured: "the back-end opt out is limited to a few persons per year," future mesothelioma victims are offered at best modest recoveries, and fixed damage sums contain no adjustment for inflation. App. 25a, 49a.

The court below recognized that these conflicts might have been mitigated had the "differently situated plaintiffs negotiate[d] for their own unique interests." App. 51a. In the absence of structural protections, such as subclasses, within the Settlement, the intra-class conflicts "preclude[] a finding of adequacy of representation." *Id.* The court's conclusion, thus, rests upon the actual terms of the Settlement, not on some imagined conflict which would arise in the course of litigation.

2. Superiority

The second alternate independent ground supporting the decision below arises from the Third Circuit's holding that the "superiority" requirement of Rule 23(b)(3) was not met. The Third Circuit found that requirement to be

[8] The court below catalogued the differing interests of present and future victims. Potential "futures" plaintiffs would desire delayed opt-out rights, no preset limits on how many cases may be handled, and damage values that keep pace with inflation and scientific developments. In contrast, those currently injured would rationally want to maximize current payouts and would care little about future opt-out rights: "indeed, their interests are against such an opt out as the more people [are] locked into the settlement, the more likely it is to survive." App. at 50a.

lacking even if the class were not considered as a litigation class, determining that, in the context of this case, "[p]laintiffs have a substantial stake in making individual decisions on whether and when to settle" and that "in this class action, plaintiffs may become bound to the settlement even if they are unaware of the class action or lack sufficient information to evaluate it." App. at 55a, 55a.

The court explained its views as follows:

> First, exposure-only plaintiffs may not know that they have been exposed to asbestos within the terms of this class action. . . Second, class members who know of their exposure but manifest no physical disease may pay little attention to class action announcements. Without physical injuries, people are unlikely to be on notice that they can give up causes of action that have not yet accrued. Third, even if class members find out about the class action and realize they fall within the class definition, they may lack adequate information to properly evaluate whether to *opt out of the settlement*.

App. 55a-56a (emphasis added). In short, the Third Circuit determined that a class settlement was not a "superior" means of resolving this case, as Rule 23(b)(3) requires, because of what it perceived to be potentially "insurmountable" problems in informing many class members sufficiently to permit them to "make a reasoned decision about whether to stay" in the Settlement. App. at 55a, 56a.

This holding quite clearly is based – *not*, as Petitioners claim, on the notion that the Settlement cannot be

considered in ruling on class certification – but on *the very consideration of the Settlement that Petitioners desire*. Thus, the Third Circuit stressed that it was *not* holding that "Rule 23 prohibits binding futures plaintiffs to a 23(b)(3) opt-out class action;" rather, it was merely holding that, to meet the superiority requirement, such an action must present "significant advantages" over available alternatives – advantages it then determined *not* to be presented by the particular settlement in this case. Indeed, the court went on to specify alternative class settlement structures – such as affording a meaningful back-end opt-out right – that *would* "alleviate[]" its concerns about superiority. App. at 56a n.16. The Third Circuit thus gave Petitioners what they requested with respect to the superiority requirement – consideration of the Settlement. Its conclusion that superiority is nonetheless lacking will not be affected by any decision by this Court as to the issue raised in the Petition.

B. The Third Circuit's Interlocutory Ruling Did Not Address Fairness Contentions Inextricably Intertwined with Petitioners' Argument Nor Many Other Potentially Dispositive Claims

The Third Circuit's order, rendered prior to final judgment, is interlocutory. It is the Supreme Court's "normal practice" to deny interlocutory review. *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting), *reh'g denied*, 429 U.S. 1066 (1977). Denial of certiorari is particularly appropriate here where substantial and interrelated legal issues were not resolved, or have not even been addressed, by the court below.

1. Issues Not Addressed on the Settlement's Fairness

Because this appeal is from the issuance of a preliminary injunction, the Third Circuit has not yet reviewed important issues raised regarding the fairness of the proposed Settlement. While Petitioners want this Court to simply presume that the Settlement is fair, the issue was strenuously litigated below and the findings of the district court have yet to be reviewed. See note 1, *supra*. These fairness issues are, moreover, inextricably intertwined with Petitioners' argument to uphold the class certification in this case. They assert that the fairness of the Settlement *establishes* some or all of Rule 23 class certification requirements for the *Georgine* Settlement. Petition at 27-29. In other words, they contend a fairness finding may, in effect, substitute for the more exacting analysis of Rule 23 criteria. So, even if this Court were to adopt Petitioners' theory of class certification in the settlement context, a review of *this* class certification cannot be properly made on the partial record now before this Court.

In determining fairness, the Third Circuit applies the nine factor test, articulated in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). Thus, a district court will ordinarily evaluate, *inter alia*, the complexity and duration of the litigation, the reaction of the class to the settlement, the stage of the proceedings, the risks of establishing liability and damages, the risks of maintaining class status, the ability of the defendants to withstand a greater judgment, and the range of reasonableness of the settlement in light of the best recovery and risks of litigation.

Objecting class members have raised significant concerns with respect to many of these fairness factors including issues relating to the arguable collusiveness of the Settlement, the levels of compensation provided, the medical criteria utilized, the compensation procedures including limitations of the number and types of claims to be resolved each year, the adequacy of class counsel and conflicts of interest. In addition, California objectors have argued that the Settlement failed to adequately address and account for interstate differences.[9] Potential and actual mesothelioma victims – by definition those with the strongest cases on causation and damages – have argued that the Settlement provides woefully inadequate relief, particularly given the Settlement's draconian case flow limitations.

Without a full record on these issues, this Court can offer at most an abstract primer on class settlement procedures.

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[9] California provides the most advantageous forum for the prosecution of asbestos personal injury claims. Yet, under the Settlement, Californians give up their unique victim-oriented protections but receive very little in return, particularly when compared to class members from other states. This unfairness was further exacerbated when the district court denied discovery into what, if any, differences among states were taken into account by the Settling Parties in their negotiations, despite the clear legal requirement that an "extensive analysis" of state-by-state differences be conducted in multistate class actions. *In Re Asbestos School Litigation*, 789 F.2d 996, 1010 (3d Cir.), *cert. denied sub nom. Celotex Corp v. School Dist. of Lancaster*, 479 U.S. 852 (1986).

2. Issues Not Addressed With Respect to the Injunction

The court below rested its decision on the many inadequacies of the class certification. The court made clear, however, that the injunction was highly vulnerable on several other legal grounds which it did not directly reach:

> Although we have serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over absent class members, we will . . . pass over these difficult issues and limit our discussion to the class certification issues.

App. 19a.[10] In his concurring opinion, Judge Wellford added yet another perceived jurisdictional problem to the list – his view that class members, who do not suffer a current injury, lack standing. App. 60a. In order for the district court's injunction to stand, each of these issues of subject matter and personal jurisdiction must still be resolved. Therefore, even if the Court were to grant certiorari in this case in this posture, and reverse the circuit court decision, the lower courts would still have to grapple with numerous additional issues to uphold the injunction.

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[10] The court found some of these problems to be particularly acute with respect to those plaintiffs who will eventually develop "a fatal disease, mesothelioma, from only incidental exposure to asbestos." App. 56a.

C. The *Georgine* Decision Does Not Create an Intolerable Inter-Circuit Conflict

This Court was faced with an identical claim of inter-circuit conflict when it denied certiorari in the Third Circuit's *GM Trucks* decision less than a year ago. Petitioners can point to one intervening opinion – the Fifth Circuit's recent and not yet final[11] decision in *In re Asbestos Litig.* – to justify reconsideration of the denial of certiorari in *GM Trucks*. But nothing in *In re Asbestos Litig.* now elevates the previously asserted conflict to a level warranting Supreme Court review. Indeed, as discussed below, the passage of time has only added to the reasons for denying certiorari; we are one year closer to a modification of Rule 23 which could resolve any asserted conflict.

Petitioners claim that the *In re Asbestos Litig.* decision "starkly illuminated" inter-circuit conflict. Petition at 9. Quite the opposite is true. The only thing which *In re Asbestos Litig.* illuminates is that it is a drastically different kind of class and settlement from *Georgine* and *GM Trucks*. Both the Fifth Circuit in *In re Asbestos Litig.* and the Third Circuit in *Georgine* carefully noted the differing natures of the putative classes and took pains to draw appropriate distinctions in order to avoid a conflict.

Georgine and *GM Trucks* examined Rule 23(b)(3) damages class action settlements, while the Fifth Circuit in *In*

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[11] As of the date of this filing, a petition for rehearing is pending in the Fifth Circuit.

re Asbestos Litig. addressed a Rule 23(b)(1)(B) class.[12] Both the *Georgine* and *In re Asbestos* opinions use limiting language, recognizing the differences between 23(b)(1) and 23(b)(3) actions. Thus, the Third Circuit disclaimed resting its holding on Rule 23(a) commonality grounds because of the potential impact upon (b)(1)(B) actions. App. 43a. Similarly, the Fifth Circuit focused on the factors which establish commonality in that (b)(1)(B) action; namely, "unique risks" faced by the class and defendants, and the critical, common need to resolve hotly disputed insurance coverage litigation and thus avoid the "potentially disastrous results" of a loss of insurance coverage in the pending litigation. *In re Asbestos Litig.*, 90 F.3d at 975-76, 983.

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[12] Rule 23(b)(1) and 23(b)(3) class actions are designed to address different situations. As noted in *In re Asbestos Litig.*, different due process considerations adhere to (b)(3) damages actions than to (b)(1) actions, which are equitable in nature. *In re Asbestos Litig.*, 90 F.3d at 986-87. In (b)(1) class actions, particularly (b)(1)(B) actions, there is by definition a substantial risk that absent settlement class members may forfeit all rights, or be limited to diluted recoveries. In such situations, the need for a unitary resolution is paramount. NEWBERG & CONTE, 1 NEWBERG ON CLASS ACTIONS, § 1.22 at 1-51 (3d Ed. 1992).

In (b)(3) actions, on the other hand, there is no "make or break" necessity for class resolution. Indeed, as the Advisory Committee Notes to the 1966 amendments to Rule 23 make clear, (b)(3) treatment is reserved for those cases in which "class action treatment is not as clearly called for." Fed. Rule Civ. Proc. 23(b)(3) Advisory Committee's Notes (1966). Accordingly, heightened requirements, particularly regarding commonality and superiority, are imposed on such actions.

The *In re Asbestos Litig.* decision also demonstrates that the circuits are perfectly able to distinguish between a problematic settlement like *Georgine*, and settlements that are not overreaching and operate to the benefit of all class members. The Fifth Circuit specifically noted the differences between the *Georgine* and *In re Asbestos Litig.* settlements, and concluded that it "would likely agree with the Third Circuit" regarding its resolution of commonality and typicality issues. "As a result," the Fifth Circuit concluded, "this settlement is unaffected by the typicality and commonality problems" cited in *Georgine*. 90 F.3d at 976, n.8. Thus, the Fifth Circuit faced a settlement which established an "equitable distribution process to pay victims," (*Id.* at 976) rather than one like the *Georgine* settlement, which set fixed amounts for individuals based on the "severity of their injuries alone." *Id.* at n.8.

Although the Fifth Circuit in *In re Asbestos Litig.* repeated its previously enunciated approach to class certification in the settlement context, it added nothing to the mix that would elevate a conflict to intolerable levels. Rather, the distinctions drawn by the *In re Asbestos Litig.* and *Georgine* courts show, if anything, that the circuits approach common ground concerning the factors which are problematic in assessing futures class settlements. This does not constitute an intolerable conflict as asserted by Petitioners.

D. Any Conflict May Soon Be Mooted Because the Advisory Committee is in the Process of Amending Rule 23 to Eliminate any Uncertainty about the Propriety of Settlement Classes

The Petition concedes, as it must, that the Judicial Conference's Advisory Committee, after substantial study, has recommended that Rule 23 be amended to clarify that settlement classes may be certified even if the proposed Rule 23(b)(3) class does not meet the certification requirements for purposes of trial.[13] This fact alone is a sufficient basis for this Court to reject the Petition, since a decision by this Court on the abstract issue of settlement classes will affect, at most, a handful of cases decided in the interim before the issue is resolved.

Petitioners suggest that the proposed amendment was prompted solely by the Third Circuit's decision in this case and that, if only this Court intercedes to correct that "erroneous" ruling, "the cumbersome and time-consuming use of the rule's amendment mechanism" may be avoided. Petition at 20. This argument distorts the record.

At the request of the Judicial Conference, the Advisory Committee undertook in March 1991 a "course of Committee study" to determine whether Rule 23 should

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[13] The language of the proposed amendment is:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * * (4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

be amended "to accommodate the demands of mass tort litigation." Report of the Advisory Committee on Civil Rules, May 17, 1996. As a result of their work, the Advisory Committee has proposed a series of changes to Rule 23, which reach far beyond the settlement class issue.[14] The Advisory Committee's proposals, of course, are part of the specific process prescribed by Congress for full consideration of issues regarding the Federal Rules of Civil Procedure. *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1 (1940). Moreover, the Advisory Committee process – unlike a decision by this Court interpreting the procedural rules – has the further benefit of giving "Congress the opportunity to review the Rules before they bec[o]me effective and to pass legislation barring their effectiveness if the Rules were found objectionable." *INS v. Chaŭha*, 462 U.S. 919, 935 n.9 (1983). Particularly given the policy concerns animating the issue raised in this case, the Petition offers no reason whatever to justify its request that the Court preempt this Congressionally established process and deny Congress the "opportunity" to participate in the issue's resolution.

The Petitioners also dismiss the Advisory Committee's efforts because they argue the proposed amendment may never take effect "for any number of reasons, including the fact that it has sparked substantial controversy."

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[14] Congress has authorized the Supreme Court to prescribe "general rules of practice and procedure" for the federal courts. 28 U.S.C. § 2072. Such rules may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Any proposed rules must be submitted to Congress and may not become effective for at least seven months following submission. 28 U.S.C. § 2074.

Petition at 20-21. In fact, this argument reinforces the conclusion that this Court should defer to the completion of the Rule's process. If the Advisory Committee, after conducting its own five-year study and receiving public comments on its proposal, determines that some or all of the revisions to Rule 23 should not be made, its decision will presumably be based on a full and thoughtful analysis of all relevant prior case law. In contrast, Petitioners here seek a judicial amendment of the rules based solely upon the record and arguments presented by this highly idiosyncratic case. This is not an appropriate use of the Court's discretionary jurisdiction.

Finally, Petitioners argue that the Rule's process will take three years or more to complete, allowing for a period of "inconsistency and confusion." Petition at 21. For purposes of this case, that timeline is not markedly different from the likely timeline if this Court *does* grant certiorari. A decision from this Court would likely come in June 1997 and, even if Petitioners prevail, additional litigation will be required to resolve the many issues not reached by the Third Circuit. By that time, the Rules process would be close to completion.

Moreover, as argued *infra*, Petitioners have overstated the impact that the *Georgine* decision will have on other mass tort class action settlements. There is certainly no evidence that awaiting the completion of the Rule's process will frustrate the consummation of other settlements. As illustrated by this case and many others, mass tort class action settlements typically take a long time precisely because courts must thoroughly and carefully weigh their merits.

E. Petitioners Overstate the Impact and Reach of the *Georgine* Opinion

The Petition vastly overstates the reach and impact of the *Georgine* opinion. It is thus useful to focus on what issues *Georgine* did address, and what issues are not before this Court.

1. Contrary to the Petition's "Question Presented" and its Statement, the Third Circuit did not issue a universal holding applicable to all class actions. Rather, the decision addresses a personal injury class action brought under Rule 23(b)(3). The court explicitly disavowed making any broad pronouncement applicable to injunctive relief, limited fund or partial class actions.[15]

2. Nothing in *Georgine* prohibits the use of settlement classes. Indeed, the Court reaffirmed its earlier holding in *In re GM Trucks* that class actions may be certified for settlement purposes only. App. 36a. The Third Circuit is, therefore, fully in accord with the MANUAL FOR COMPLEX LITIGATION (Third) (Federal Judicial Center 1995), which cautiously endorses the use of settlement classes, but requires closer scrutiny of such settlements where the class has not previously been certified in adversarial litigation. *Id.* at 243.

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[15] The Petition incompletely quotes the Third Circuit as holding that the district court should apply the class certification criteria of Federal Rule of Civil Procedure 23 "as if the case were to be litigated". Petition at 1-2. The full phrase stated *"the Rule 23(b)(3) criteria* must also be applied as if the case were to be litigated." (emphasis added) App. at 19a.

3. Nor does *Georgine* require that the district court ignore the settlement in assessing class certification or the settlement itself. Indeed, as noted above, the *Georgine* court considered the terms of the Settlement in assessing Rule 23 adequacy of representation and superiority criteria. App. 49a. Moreover, *Georgine* did not disturb the well-settled Third Circuit doctrine that requires district courts, when assessing the fairness of a class action settlement, to consider, among other factors, "the complexity . . . and duration of the litigation," "the stage of the proceedings . . . ," and "the risks of maintaining a class action. . . . " *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The Third Circuit reaffirmed the appropriateness of such *Girsh* factors as recently as the *GM Trucks* decision.

4. The Petition wrongly implies that, in order to assess the certification of a settlement class after *Georgine*, a district court must all but try the case. This argument ignores, however, the well-settled doctrines guiding all class certification determinations – litigated or not – under Rule 23. The court is prohibited from considering the merits of the action in determining class status. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974). Moreover, since Rule 23 requires a determination of class status "as soon as practicable", but subject to later alteration or amendment, the district court is not forced to speculate about all potential problems down the road. Rule 23(c)(1). Indeed, even in fully litigated class certification proceedings, the class certification may not be denied because the district judge "fears insurmountable problems may later appear . . . " *Windham v. American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir.), *cert. denied*, 435 U.S. 968 (1978); *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.), *cert. denied*, 429 U.S. 969 (1976) (possibility that later proceedings may prove decision to certify was incorrect is no reason to deny class certification).

5. Neither the *Georgine* decision, nor the *GM Trucks* decision that preceded it, has thrown "the law governing class action settlements into complete confusion". Petition at 2. Indeed, neither decision has stood as an obstacle to the approval of class action settlements such as the *In re Asbestos Litig.* or the *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, (1994 U.S. Dist. LEXIS 12521, N.D. Ala. Dec. 22, 1995) cases cited by Petitioners.

6. The *Georgine* decision does not preclude class or consolidated resolution of asbestos or other mass tort cases. As the Third Circuit noted, Rule 23(b)(3) class treatment – in a less overbroad format – is still available and appropriate, as are a host of procedural devices that streamline resolution of claims. App. 57a. Moreover, the *Georgine* decision has no effect on class treatment of mass tort cases under Rule 23(b)(1)(B).

7. This case is a stronger candidate for denial of certiorari than was the *GM Trucks* decision. Not only are there independent grounds for the Third Circuit's decision, but the interlocutory nature of its decision would limit any Supreme Court review to an abstract issue of no practical consequence to this litigation. To the extent there are conflicting circuit approaches to Rule 23, the rules revision process is properly the forum of first resort.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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